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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 **JAMES G. GARCIA,**

16 Plaintiff,

17 v.

18 **BEN CURRY, Warden, et al.,**

19 Defendants.
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C 07-6262 CRB (PR)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT**

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C 07-6262 CRB (PR)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT**

21 TO JAMES GARCIA, PLAINTIFF PRO SE:

22 PLEASE TAKE NOTICE that Defendants A. Tucker, B. Curry, V. Khan, D. N. McCall, A.
23 E. Roberts, and P. Barker (Defendants) move for summary judgment under Federal Rule of Civil
24 Procedure 56 because the undisputed facts in this case demonstrate that Defendants are entitled
25 to judgment as a matter of law and Defendants are entitled to qualified immunity. The motion
26 for summary judgment is made on the grounds that the facts do not support claims of retaliation.

27 This motion is based on: the supporting declaration of L. Korman, the following
28 memorandum of points and authorities, and the file in this case.

Defs.' Not. Mot. & Mot. Summ. J.

J. G. Garcia v. B. Curry, et al.
C 07-6262 CRB (PR)

Memorandum of Points and Authorities

Introduction

Garcia claims that Defendants retaliated against him based on his conduct and influence as an inmate-advisory-council member. (Order 2.) Rather, Defendants issued a rules-violation report against Garcia because he failed to follow direct orders during an emergency situation. And when Garcia alleged staff misconduct, Defendants placed him in administrative segregation to preserve the integrity of the misconduct investigation. Later, Defendants transferred Garcia to another institution to avoid safety concerns based on a threat assessment completed by Sergeant Locke that indicated Locke felt threatened and intimidated by Garcia.

There was a legitimate penological interest for all actions Defendants took concerning Garcia. Defendants' conduct was guided by concern for institutional safety and compliance with title 15 of the California Code of Regulations. Further, Garcia has not shown that Defendants' alleged actions chilled his protected activities or that he was harmed in any way.

Statement of the Issues

Defendants' motion presents the following issues:

1. Garcia cannot prove retaliation unless the evidence shows that Defendants took adverse action against him because of his protected conduct and as a result, his First Amendment rights were chilled. Further, Garcia must show that Defendants' action did not reasonably advance a legitimate correctional goal. Here, Defendants issued Garcia a rules-violation report for failing to follow direct orders during an emergency situation, and placed Garcia in administrative segregation pending an investigation into his allegations of staff-misconduct, as is required by title 15 of the California Code Regulations. Defendants later transferred Garcia to another correctional institution based on safety concerns. Are Defendants entitled to summary judgment on the retaliation claims?
2. Defendants are entitled to qualified immunity if a reasonable officer in their position could have believed that the actions concerning Garcia had legitimate bases. Here

1 Defendants closely followed prison procedures by giving Garcia a rules-violation when
 2 he refused to follow directions during an emergency and housed Garcia in a manner
 3 that protected Garcia's safety and the integrity of an investigation. Are the moving
 4 Defendants entitled to qualified immunity?

5 Statement of the Case

6 Plaintiff James Garcia is a pro-se former state inmate who filed this complaint under 42
 7 U.S.C. § 1983 while incarcerated at Correctional Training Facility (CTF). (Order Serv. 1, April
 8 18, 2008.) Under 28 U.S.C. § 1915A, this Court screened Garcia's complaint and found
 9 cognizable claims for use of excessive force against Sergeant L.S. Locke, and retaliation against
 10 Locke, Khan, Tucker, McCall, Barker, Roberts, and Curry. The Court ordered service of
 11 Garcia's excessive-force and retaliation claims on defendants Khan, Tucker, McCall, Barker,
 12 Roberts, and Curry. (Order Serv. 3) The Court also ordered service on Sergeant Locke. (*Id.*)
 13 Garcia seeks a declaration that his rights have been violated and damages.

14 Service has not been effected as to Sergeant Locke. (*See* Ct. Docket.) Defendants therefore
 15 do not address the excessive-force claim against Sergeant Locke. Defendants address Garcia's
 16 claims that they violated his First Amendment rights by retaliating against him for his conduct
 17 and influence as an inmate-advisory-council member. (Order Serv. 2.)

18 Statement of Undisputed Facts

19 **A. The Parties.**

- 20 1. Garcia is a state inmate currently housed at Ironwood State Prison. During the events
 21 at issue in the complaint, Garcia was housed at CTF. (Compl. ¶ 1.)
- 22 2. Defendant Khan is a Correctional Lieutenant who served as the Senior Hearing Officer
 23 in CTF North Facility. (Compl. 4.)
- 24 3. Defendant Tucker was a Facility Captain at CTF. (*Id.*)
- 25 4. Defendant Roberts was a Custody Captain at CTF. (*Id.*)
- 26 5. Defendant Barker was the Chief Deputy Warden at CTF. (*Id.* 3.)
- 27 6. Defendant Curry was the Acting Warden at CTF. (*Id.*)
- 28 7. Defendant McCall was a Correctional Lieutenant and Unit V Senior Hearing Officer at

1 CTF. (*Id.* 5.)

2 **B. Garcia violated prison rules by refusing to comply with direct orders to prone-out**
 3 **during an emergency.**

4 8. On September 29, 2006, an announcement transmitted by the public announcement
 5 system instructed all inmates on A-Yard to prone-out, or lay flat on the ground. (Compl. Ex. D.
 6 at 9). All inmates on the yard except Garcia responded by getting in a prone position. (Decl. L.
 7 Korman Supp. Defs.' Mot. Summ. J. (Korman Decl.) Ex. B.) Garcia twice refused direct orders
 8 from Correctional Officer Gomez to assume a prone position. (*Id.*) Officer Gomez indicated
 9 that he contacted Sergeant Locke and informed him of Garcia's serious disruption of facility
 10 operations, and acts of disobedience and disrespect. (*Id.*)

11 9. Correctional Officer Gomez reported the incident on a rules violation report, log no.
 12 09-06-044. (*Id.*) Officer Gomez's written report does not mention Garcia's membership on the
 13 inmate advisory council, known as the Men's Advisory Council (MAC), but focuses on the
 14 events of September 29, 2006.

15 10. The next day, September 30, 2006, Garcia was summoned to report to the Unit V
 16 Lieutenant's Office. (Compl. Ex. E at 36-8.) When Garcia arrived, Sergeant Locke attempted to
 17 explain to him his responsibilities as a MAC member during alarm activation and stressed the
 18 responsibility of an elected member of the MAC. (*Id.* at 38) Sergeant Locke informed Garcia
 19 that his conduct placed himself and others in danger by his failure to assume a prone position.
 20 (*Id.*) According to Sergeant Locke, Garcia was unreceptive to counseling and became upset,
 21 arguing with Sergeant Locke and stating that he would file a citizen's complaint. (*Id.*) Sergeant
 22 Locke reported that it seemed Garcia was trying to intimidate him and keep him from continuing
 23 disciplinary actions against Garcia because of his position on the MAC. (*Id.*)

24 11. On October 10, 2006, Defendant Khan conducted a hearing for rules violation report
 25 log no. 09-06-044. (Korman Decl. Ex. B.) During this hearing, Defendant Khan asked Garcia a
 26 series of questions, including whether Garcia assumed a prone position during the alarm and
 27 whether Garcia saw other inmates on the yard in prone position. (*Id.*) Defendant Khan also
 28 asked Garcia if he was aware of inmate responsibilities during alarm responses for CTF yard.

1 (*Id.*) Defendant Khan's written report of the hearing and the rules violation report does not
 2 mention Garcia's status as a MAC member. (*Id.*)

3 12. On October 10, 2006, Garcia was found guilty of violating title 15, section 3005(b) of
 4 the California Code of Regulations, for refusing to prone out during an emergency. (*Id.*) The
 5 circumstances of this report were deemed serious, meaning that Garcia's conduct was a serious
 6 disruption to facility operations and created a potential for mass disruptive conduct. (*Id.*; see
 7 Cal. Code Regs., tit. 15 § 3315 (3)(H).)

8 13. On November 7, 2006, Defendant McCall found Garcia guilty of violating California
 9 Code of Regulations, title 15, section 2005 (a), Conduct Which Could Lead to Disorder.
 10 (Compl. Ex. E at 42, rules violation report log no. 09-06-047.) There was a separate hearing on
 11 November 7, 2006 for this rules violation report. (*Id.* at 42.) Defendant McCall found Garcia
 12 guilty based on both Sergeant Locke's report of the discussion on September 30, 2006 between
 13 himself and Garcia, and Garcia's admission that he debated with Sergeant Locke. (*Id.* at 43.) In
 14 this rules violation report, Defendant McCall reported that Garcia had a responsibility to work
 15 with line staff to relay information to the inmate population, especially involving any type of
 16 emergency. (*Id.* at 44.) Defendant McCall wrote that as an elected member of MAC, Garcia is
 17 held to a higher standard and cannot choose when to act as an individual and when to be held
 18 accountable as an elected MAC member. (*Id.*)

19 14. But later that same day, Defendant McCall decided to reduce rules violation report, log
 20 no. 09-06-047, to a CDCR 128-B information chrono, to be placed in Garcia's C File regarding
 21 actions taken while an elected member of the Men's Advisory Committee. (*Id.* at 31.) The
 22 rules-violation report was removed from Garcia's central file because Defendant McCall
 23 considered the evidence Garcia presented at the hearing and decided, based on a preponderance
 24 of the evidence, that the rules-violation report should be reduced to an information chrono. (*Id.*
 25 at 32.)

26 **C. Garcia was placed in administrative segregation pending the outcome of his staff-**
 27 **misconduct allegation against Sergeant Locke.**

28 15. On October 3, 2006, Garcia submitted inmate appeal log no. 06-03323, alleging

1 excessive force against Sergeant Locke for the incident on September 29, 2006 during which
 2 Garcia refused to prone out. (Compl. Ex. D at 9-17.) This appeal was processed as a staff
 3 complaint. (*Id.*)

4 16. On October 20, 2006, Defendant Khan issued Garcia a CDCR 114-D administrative
 5 segregation placement notice. (Compl. Ex. H at 63.) Garcia's placement on administrative
 6 segregation status was because he alleged staff misconduct by Sergeant Locke. (*Id.*) The notice
 7 stated that Garcia's continued presence at CTF-North may jeopardize the integrity of the
 8 investigation, and Garcia was to be retained on administrative segregation status pending the
 9 outcome of the investigation into the matter. (*Id.*)

10 17. Title 15, section 3335(a) of the California Code Regulations requires that an inmate be
 11 removed from general population and placed in administrative segregation when that inmate's
 12 presence in an institution's general inmate population jeopardizes the integrity of an investigation
 13 of an alleged serious misconduct or criminal activity.

14 18. On October 26, 2006, Garcia appeared before the Institutional Classification
 15 Committee for his initial administrative-segregation-placement review. (Compl. Ex. H at 60).
 16 Defendant Barker was the chairperson of this review. (*Id.*) The CDCR 128-G classification
 17 chrono indicates that Garcia was to be retained in administrative segregation while officials
 18 investigated his allegations of staff misconduct. (*Id.*) Garcia was kept in administrative
 19 segregation because his presence in the general population jeopardized the integrity of the
 20 investigation into alleged serious misconduct. (*Id.*)

21 **D. Sergeant Locke requested that Garcia be transferred to another California State**
 22 **Correctional Facility to avoid further intimidation by Garcia.**

23 19. On October 23, 2006, Garcia submitted inmate appeal no. 06-03639, alleging that his
 24 placement in administrative segregation on October 20, 2006 was unwarranted and in retaliation
 25 for filing an appeal. (*Id.* at 58.) Garcia received both a second-level response and a final,
 26 director's level response to this appeal. (*Id.* at 56-7, 61-2.)

27 20. On December 14, 2006, Garcia appeared before the CTF administrative-segregation-
 28 unit Institutional Classification Committee for his program review. (*Id.* at 66.) The committee

1 documented this hearing on a CDCR 128-G classification chrono. (*Id.*) Sergeant Locke had
 2 requested that Garcia be transferred in order to avoid intimidation by Garcia in an effort to
 3 prevent Locke from filing disciplinary actions against Garcia. (*Id.* at 66, 31.) Garcia stated to the
 4 committee that he felt there would be further confrontations with Locke. (*Id.*) The
 5 Administrative Segregation Institutional Classification Committee reviewed the entirety of
 6 Garcia's file and concluded that in order to avoid safety concerns a confrontation might pose for
 7 Sergeant Locke and Garcia, the Committee elected to transfer Garcia to another institution. (*Id.*
 8 at 66.)

9 21. On January 2, 2007, Defendant Curry responded to appeal no. 06-03639 on a second-
 10 level reviewer's supplemental response. (*Id.* at 61-2.) This response indicates that Garcia's
 11 allegations against Sergeant Locke were unsubstantiated. (*Id.* 61.) Further, the response
 12 indicates that the unit facility captain, Defendant Roberts, submitted a threat assessment
 13 concerning Garcia's presence at CTF. (*Id.*) Defendant Curry concurred with Defendant Roberts
 14 that Garcia should be transferred. (*Id.*) The transfer was considered by Defendants Robert and
 15 Curry after Sergeant Locke submitted an informational chrono stating that he felt threatened by
 16 Garcia being housed at CTF and requested that Garcia be transferred to an alternate institution.
 17 (*Id.*) Garcia was to remain in administrative segregation pending endorsement and transfer to
 18 another institution. (*Id.*) This response clearly stated that Garcia's transfer was based on the fact
 19 that Sergeant Locke felt threatened by Garcia's presence at CTF and that the transfer was to
 20 maintain the safety of staff and the security of the institution. (*Id.*)

21 22 Summary Judgment Standard

23 Summary judgment may be granted only when there is no genuine issue of material fact and
 24 the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are
 25 those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 26 248 (1986). The movant bears the initial burden of identifying those portions of the pleadings,
 27 discovery, and affidavits that demonstrate the absence of a genuine issue of material fact.
 28 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the movant meets its initial burden,

entry of summary judgment is mandated where the nonmoving party fails to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). There is no triable issue of fact unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson*, 477 U.S. at 249. All reasonable inferences must be drawn in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). But if the nonmoving party’s version of facts is “blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

Argument

I.

The undisputed evidence shows that the retaliation claims are unfounded and barred as a matter of law.

Garcia bears the burden to set forth facts that satisfy each element necessary for a prima-facie case of retaliation. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). An inmate must demonstrate five elements to establish a successful retaliation claim: (1) that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005). These elements are not present in this case, and defendants Tucker, Curry, Khan, McCall, Roberts, and Barker are each entitled to summary judgment on the retaliation claims.

Retaliation claims brought by prisoners must be evaluated in light of concerns over “excessive judicial involvement in day-to-day prison management, which ‘often squander[s] judicial resources with little offsetting benefit to anyone.’” *Pratt*, 65 F.3d at 807 (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)). In particular, courts should “‘afford appropriate deference and flexibility’ to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory.” *Id.* (quoting *Sandin*, 515 U.S. at 482).

A. Garcia's placement in administrative segregation was necessary for the integrity of the investigation into his allegations of staff misconduct in accordance with California Code Regulations and not done for retaliatory purposes.

Garcia alleges Defendants Khan and Tucker responded to his inmate appeal by placing him in administrative segregation. In fact, Garcia's placement in administrative segregation was mandated by prison rules and regulations. In inmate appeal no. 06-03323, Garcia alleged unnecessary use of force by Sergeant Locke during the incident on September 29, 2006. (Compl. Ex. D at 9.) As a result, a staff-misconduct inquiry was conducted. (*Id.* at 12.) Garcia alleges that Defendant Khan's order placing Garcia in administrative segregation was unwarranted and in retaliation for exercising his First Amendment right to file a grievance. (*Id.* Ex. H at 58.) But requiring that inmates be transferred to administrative segregation pending an investigation into allegations of staff misconduct comports with statewide regulations. Title 15, section 3335(a) of the California Code Regulations requires that an inmate be removed from general population and placed in administrative segregation when that inmate's presence in an institution's general inmate population jeopardizes the integrity of an investigation of an alleged serious misconduct or criminal activity. And thus, these regulations serve a legitimate penological purpose. *See Hewitt v. Helms*, 459 U.S. 460, 473 (1983) (stating that the isolation of a prisoner in administrative segregation due to a pending investigation can serve important institutional interests including the insulation of possible witnesses from coercion or harm).

Garcia's placement in administrative segregation ensured the integrity of the investigation of alleged serious misconduct. (*See* CDCR 114-D, Compl. Ex. H. at 63 (administrative segregation placement order).) The decision to move Garcia was not based on any retaliatory motive by Defendant Khan. In fact, Defendant Khan followed rules and regulations, advancing legitimate penological interests, including maintenance of order in the prison and institutional safety. *See Procunier v. Martinez*, 416 U.S. 396, 412 (1974). There was no discretion on the part of Defendant Khan: the rules require that all inmates be transferred to administrative segregation if their presence jeopardizes the investigation. *See* Cal. Code. Regs., tit. 15 § 3335(a). *Hartman v. Moore*, 547 U.S. 250, 260 (2006) states that retaliatory motive must have been the but-for cause for the adverse action at issue, or the retaliation claim fails. Here,

1 retaliatory motive could not have been the but-for cause because the rules required the
 2 Defendants' action regardless of their motive. Because Garcia was placed into administrative
 3 segregation pending an investigation into staff misconduct, Defendant Khan is entitled to
 4 summary judgment.

5 Further, Defendant Tucker is entitled to summary judgment because Garcia has not
 6 shown that he directly participated in the alleged adverse action of transferring Garcia to
 7 administrative segregation. Garcia alleges that Defendant Tucker signed Defendant Khan's order
 8 placing Garcia in administrative segregation. (Compl. 5 ¶ 5.) But Defendant Tucker's signature
 9 does not appear on Garcia's referenced exhibit. (*Id.* Ex. G. at 54.) And because "liability under
 10 section 1983 arises only upon a showing of personal participation by the defendant," Defendant
 11 Tucker is not liable for retaliation under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
 12 1989). Defendant Tucker has not personally participated in Defendant Khan's alleged retaliatory
 13 action.

14 **B. The rules-violation report for Garcia's refusal to prone-out advanced the legitimate**
 15 **penological purpose of institutional safety, and there is no evidence of retaliatory**
 16 **motive.**

17 Garcia contends that Defendant Khan and Sergeant Locke wrote a false rules-violation
 18 report against him in retaliation for his conduct and influence as a member of the inmate advisory
 19 council. (Order 2.) This allegation has no evidentiary support. Correctional Officer Gomez
 20 reported the September 29, 2006 incident during which Garcia refused to prone out on a rules-
 21 violation report, log no. 06-09-044. (Korman Decl. Ex. B.) Garcia has not shown that his
 22 influence or membership in the inmate-advisory council were at issue or even mentioned in rules
 23 violation report log no. 09-06-044. Officer Gomez did not refer to Garcia's status as a MAC
 24 member in his report. (*See id.*) During the hearing on this rules violation, Defendant Khan
 25 simply asked Garcia if he assumed a prone position, if he saw other inmates assume a prone
 26 position, and if he was aware of the requirement that all inmates prone-out. (*Id.*) These
 27 questions do not reference Garcia's status as a MAC member. There is no evidence that the
 28 issuance of the rules-violation report was in retaliation for Garcia's conduct or influence as a
 MAC member.

1 Instead, the issuance of the rules-violation report for refusing to prone out on September
2 29, 2006 was proper. Garcia refused a direct order and as a result, was properly issued a rules-
3 violation report. This report was issued because of Garcia's refusal to prone out and not for any
4 retaliatory purpose. Defendant Khan is therefore entitled to summary judgment because there
5 was no retaliatory action.

6 **C. The informational chrono based on actions taken while Garcia was an elected MAC**
7 **member was proper and did not violate Garcia's First Amendment rights.**

8 Garcia alleges that Defendant McCall found him guilty of conduct that could lead to
9 disorder. In fact, on November 7, 2006, Defendant McCall *initially* found Garcia guilty of
10 violating California Code of Regulations, title 15, section 2005 (a), Conduct Which Could Lead
11 to Disorder. (Compl. 42.) But on the same date, Defendant McCall reduced this rules-violation
12 report to an administrative-level offense, and then further, to an informative chrono, or CDCR
13 128-B form. (*Id.* Ex. E at 31.) After re-consideration of all evidence presented at the hearing,
14 Defendant McCall felt it proper to reduce the rules-violation report. (*Id.* at 35.)

15 Defendant McCall did not draft the informational chrono, but instead included Sergeant
16 Locke's description of Garcia's behavior during their conversation on September 30, 2006. (*Id.*)
17 In his description, Sergeant Lock attempted to explain to Garcia the importance of inmate
18 responsibilities during alarm activation. (*Id.* at 42.) According to Sergeant Locke, Garcia was
19 unreceptive to counseling and argued with Sergeant Locke. (*Id.*)

20 The purpose of documenting Garcia's conduct during the meeting was to record Garcia's
21 minor misconduct. (*Id.* at 61.) Defendant McCall's responsibility as a Lieutenant and Senior
22 Hearing Officer includes documenting incidents such as the meeting between Sergeant Locke
23 and Garcia. (*Id.* at 42.) Defendant McCall was not retaliating against Garcia. Instead, he found
24 that based on a preponderance of the evidence at the hearing for the rules-violation report, the
25 rules-violation should be reduced to an informative chrono. (*Id.* at 35.) Garcia received no loss
26 of credits and no loss of privileges. (*Id.* at 31.) As such, Defendant McCall's reduction of the
27 rules violation report regarding the conversation with Sergeant Locke on September 30, 2006 and
28 issuance of a CDCR 128-B chrono was in furtherance of a legitimate penological interest.

D. Garcia's transfer to Ironwood Prison was for legitimate penological purposes and did not violate his First Amendment rights.

Garcia broadly alleges that he was transferred to another institution for retaliatory motives. But he provides no evidence that he was transferred to another institution because of his conduct or influence as a MAC member, or because of filing inmate grievances. He only alleges that he was summoned to a hearing and informed of his pending transfer, and then later, he was transferred. (Compl. Claim 2.) In fact, the evidence demonstrates that Garcia's transfer was the culmination of Sergeant Locke's threat assessment concerning Garcia's attempts to intimidate Locke, the need to ensure institutional safety, and Garcia's own admission that there would be further confrontations with Sergeant Locke. (*Id.* at 61.) The documentation of the transfer process demonstrates that the move was done in furtherance of legitimate penological purposes, specifically, institutional safety.

Correctional staff have a legitimate penological interest in maintaining institutional security at the prison. *Schroeder v. McDonald*, 55 F.2d 454, 461-62 (9th Cir. 1995). This includes transferring a prisoner to another institution if appropriate. *Id.* Here, Sergeant Locke felt so threatened by Garcia that he completed a threat assessment. Sergeant Locke wanted to avoid further intimidation by Garcia. (*Id.*, Compl. Ex. I at 66.) Garcia acknowledged further confrontations with Sergeant Locke. (*Id.*) And Garcia's transfer was recommended solely because Garcia posed a threat to the safety of staff and the security of the institution. (Compl. Ex. H at 61.) The Administrative Segregation Institutional Classification Committee reviewed the entirety of Garcia's file and concluded that in order to avoid safety concerns a confrontation might pose for Sergeant Locke and Garcia, Garcia should be transferred to another institution. (*Id.* at 66.)

On October 23, 2006, Garcia submitted inmate appeal no. 06-03639, alleging that his placement in administrative segregation on October 20, 2006 was unwarranted and in retaliation for filing an appeal. (*Id.* at 58.) Garcia had been placed in administrative segregation on October 10, 2006 for protection of the integrity of the investigation of alleged staff misconduct against Sergeant Locke. The responses to Garcia's inmate appeal demonstrate that Garcia's transfer was

1 necessary to maintain the safety of staff and the security of the institution and not for retaliatory
2 purposes. (*See id.* at 61-2.)

3 On December 14, 2006, Garcia appeared before CTF administrative segregation unit for
4 his program review. (*Id.* at 66.) The written documentation of the hearing, a CDCR 128-G form,
5 indicates that Sergeant Locke requested that Garcia be transferred to avoid further intimidation
6 by Garcia in an effort to prevent Locke from filing disciplinary actions against Garcia. (*Id.* at
7 31.) Garcia stated to the committee that he felt there would be further confrontations with Locke.
8 (*Id.* at 66) To avoid any safety concerns a confrontation might pose for the Locke and Garcia, the
9 committee elected to transfer Garcia to another level III institution. (*Id.*)

10 On January 2, 2007, Defendant Curry signed the second-level response to Garcia's
11 appeal no. 06-03639, indicating that Garcia's allegations against Sergeant Locke were
12 unsubstantiated. (*Id.* at 61.) Further, a threat assessment was completed by the unit facility
13 captain, Defendant Roberts, and the associate warden, Defendant Curry, who concurred that
14 Garcia should be transferred. (*Id.*) These high-ranking individuals considered a transfer after
15 Sergeant Locke submitted an informational chrono stating that he felt threatened by Garcia being
16 housed at CTF and requested that Garcia be transferred to an alternate institution. (*Id.*)
17 According to Defendants' response to the appeal, Garcia's transfer is based on the fact that
18 Sergeant Locke felt threatened by Garcia's presence at CTF because Garcia was trying to
19 intimidate him and prevent Locke from filing disciplinary actions against him. (*Id.* at 61.) The
20 response also explains that the transfer is to maintain the safety of staff and the security of the
21 institution. (*Id.*) Garcia was to remain in administrative segregation pending endorsement and
22 transfer to another institution. (*Id.*)

23 **E. Garcia has not shown that Defendants' alleged actions chilled his protected**
24 **activities or that he was harmed in any way.**

25 Garcia has provided no admissible evidence showing that Defendants' actions chilled his
26 First Amendment rights. *See Rhodes*, 408 F.3d at 567-68 & n.11. "[A] retaliation claim may
27 assert an injury no more tangible than a chilling effect on First Amendment rights," but "without
28 alleging a chilling effect, a retaliation claim without allegation of other harm is not actionable."

1 *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001); *see also Resnick v. Hayes*, 213 F.3d 443,
 2 449 (9th Cir. 2000) (holding that a retaliation claim must allege that the Plaintiff's First
 3 Amendment rights have been infringed or chilled).

4 A chilling effect exists when an official's act "would chill or silence a person of ordinary
 5 firmness from future First Amendment activities." *Mendocino Environmental Center v.*
 6 *Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (quoting *Crawford-El v. Britton*, 93
 7 F.3d 813, 826 (D.C. Cir. 1996), *vacated on other grounds*, 520 U.S. 1273 (1997)). Garcia
 8 alleges that Defendants placed him in administrative segregation, wrote a false rules-violation
 9 report, and transferred him to another institution. But his First Amendment activity was not
 10 chilled. Garcia filed an appeal three days after his placement in administrative segregation. (*See*
 11 Compl. Ex. H at 58, inmate appeal no. 06-03639.) He also filed an appeal after Defendant
 12 McCall reduced his rules-violation report of November 7, 2006 to a CDCR 128-B. (Compl. Ex.
 13 E at 27, inmate appeal no. 06-03995.) And months later, after his transfer from CTF, Garcia
 14 filed a Tort Claim with the California Victim Compensation and Government Claims Board.
 15 (Compl. Ex. J at 69-73.)

16 Garcia also fails to provide admissible evidence of harm as a result of the alleged
 17 retaliatory acts that would be sufficient to show a "chilling effect." *See Rhodes*, 408 F.3d at 568,
 18 n. 11. Garcia does not reference any specific motion or lawsuit that he failed to file or was
 19 unable to file because of Defendants' actions. Since Garcia cannot provide evidence of harm
 20 resulting from Defendants' alleged adverse actions, Defendants are entitled to summary
 21 judgment against his retaliation claims for placement in administrative segregation, issuance of a
 22 "false" rules-violation report, and transfer to another institution.

23 II.

24 **Defendants are shielded from any potential damages** 25 **liability by the doctrine of qualified immunity.**

26 Summary judgment is proper in this case because Defendants are entitled to qualified
 27 immunity. Governmental officials are entitled to qualified immunity from liability from civil
 28 damages if their conduct does not violate "clearly established statutory or constitutional rights of

1 which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
2 Qualified immunity “provides ample protection to all but the plainly incompetent or those who
3 knowingly violate the law.” *Burns v. Reed*, 500 U.S. 478, 495 (1991) (citations omitted).

4 In determining whether a governmental official is entitled to qualified immunity, the
5 Supreme Court set out a sequence of queries to be considered. *Saucier v. Katz*, 533 U.S. 194
6 (2001). The *Saucier* Court explained that an official is entitled to qualified immunity unless: (1)
7 the plaintiff alleged facts that show a constitutional violation, and (2) it was clearly established,
8 at the time, that the conduct was unconstitutional. *Saucier*, 533 U.S. at 201. This inquiry “must
9 be undertaken in light of the specific context of the case, not as a broad general proposition.” *Id.*

10 As discussed above, the evidence demonstrates that Garcia’s constitutional rights have
11 not been violated by Defendants. Garcia has not alleged harm resulting from his placement in
12 administrative segregation, or his transfer to another facility. Nevertheless, even if the Court
13 were to determine that further clarification of the law is necessary, and that Defendants’ conduct
14 did violate the Constitution, it was not clearly established at the time that Defendants acted that
15 their conduct was unlawful.

16 Defendants followed prison regulations that served legitimate penological purposes when
17 they placed Garcia in administrative segregation pending the outcome of his allegation of staff
18 misconduct. *See Hewitt*, 459 U.S. at 473. They were also following prison regulations when they
19 transferred him to another institution. All of these actions were done in furtherance of
20 maintaining institutional safety, and not in retaliation for Garcia’s conduct or influence as a MAC
21 member, or filing inmate appeals. A reasonable official in Defendants’ position could have
22 believed that the actions concerning Garcia were based on legitimate bases and did not violate
23 clearly established law. *See Marquez v. Gutierrez*, 322 F.3d 689, 692-93 (9th Cir. 2005)
24 (explaining that qualified immunity is not defeated simply because there is a dispute about the
25 defendants’ motives and examining whether qualified immunity applies by looking at the actions
26 at issue through the perspective of a reasonable officer). Thus, Defendants are entitled to
27 qualified immunity.

28 ///

Conclusion

For the foregoing reasons, Defendants A. Tucker, B. Curry, V. Khan, D. N. McCall, A. E. Roberts, and P. Barker respectfully request that the Court grant them summary judgment because the undisputed evidence demonstrates that they are entitled to judgement as a matter of law.

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Respectfully submitted,

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